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No. 950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHARLES W. SPENCER, ET AL., *Petitioners,*

v.

NEW ORLEANS TERMINAL COMPANY and SOUTHERN PACIFIC COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NEW ORLEANS TERMINAL COMPANY IN OPPOSITION

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QUESTION PRESENTED

Section 1(18) of the Interstate Commerce Act prohibits a railroad carrier from abandoning "all or any portion of a line of railroad, or the operation thereof," without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission. Section 1(22) excepts from the Commission's authority "spur, industrial, team, switching, or side tracks, located . . . wholly within one State . . . ."

The question presented is whether the petitioners, officials of a Louisiana political subdivision, may compel this respondent to abandon, without obtaining a certificate of public convenience and necessity from the ICC, certain of the respondent's tracks that are used in performing its function of linking the trunkline railroads serving New Orleans and thus making possible the movement of freight through that gateway.

STATEMENT

Respondent, New Orleans Terminal Company, is a common carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. It is a part of the Southern Railway System, which serves thirteen southeastern and midwestern states and the District of Columbia. Respondent's role in the System is to serve as a link between the System's long-haul road that enters New Orleans from the east and other major carriers that serve New Orleans from the north and east, on the one hand, and the trunkline railroads operating to the west of New Orleans, on the other. (See Pet. pp. B-1-B-2). On its sixteen-mile line in metropolitan New Orleans respondent carries about 75 per cent of the rail freight that transits the New Orleans gateway; about 89 per cent of the traffic handled on respondent's system is interstate traffic.[1] Petitioners are members of the governing body and

[1] The District Court said that 52.4% of respondent's traffic was interstate by assuming that all empty cars moved by respondent were to be related to intrastate transportation. (Pet. p. A-15). While the percentage is in no sense critical to the issues in the case, the District Court's figure does not convey an accurate impression of respondent's system, which is an essential link in the large volume of interstate traffic that moves through the New Orleans gateway.

officials of Jefferson Parish, which is a political subdivision in Metropolitan New Orleans.

With only minor exceptions, and for almost the entirety of its line in Jefferson Parish, respondent owns and operates a double main track, which enables it to handle through eastbound and westbound traffic simultaneously.[2] The western terminus of respondent's line is in Jefferson Parish, where respondent connects with the Southern Pacific, the Illinois Central and the Louisiana and Arkansas, three trunkline railroads operating to the west of New Orleans. Here respondent also has a third track, approximately 1900 feet long, which is used primarily for delivery of cars into respondent's interchange system by the Illinois Central. In this litigation the two main tracks in Jefferson Parish have been designated A and B, and the shorter interchange track has been designated track C. The sketch in the Court of Appeals' opinion (366 F.2d at 163, Pet. p. B-5) assists in orienting one to the facts of the case.

In 1958 and again in 1959 the Jefferson Parish Council enacted ordinances designed to compel respondent to abandon tracks B and C. The first ordinance repealed an earlier ordinance by which the Parish consented to having new tracks built across some roads in the Parish and directed that the crossings be removed; the second provided criminal penalties for using the crossings. Respondent brought this suit in the United

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[2] The District Court's statement that respondent's second main track in Jefferson Parish "is a relatively short track" (Pet. p. A-32) is misleading. It is 11,816 feet in length (Pet. p. A-20), which is approximately one-seventh of the length of respondent's entire system, and except for a short interruption at Metairie Road respondent's line in Jefferson Parish is a double main track. (See Pet. pp. B-4, B-5).

States District Court for the Eastern District of Louisiana to enjoin enforcement of the ordinances on the principal ground that they were invalid as in conflict with provisions of the Interstate Commerce Act, particularly Section 1(18), which prohibits a railroad from abandoning any part of its line of railroad (or constructing or extending a line of railroad) without obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. If the ordinances were enforced and the tracks at the street crossings removed, the effect would be to require abandonment of tracks B and C. (See Pet., pp. B-5-B-6). The Southern Pacific, which has certain rights to the use of track B, was permitted to intervene as a plaintiff. The Parish officials, who were defendants in the District Court and are petitioners here, counterclaimed for a declaratory judgment that the ordinances compelling respondent to abandon tracks B and C were valid notwithstanding any provision of the Interstate Commerce Act.

After a trial the District Court entered judgment for the Parish officials. In its opinion it found or recognized the facts concerning the nature of respondent's operation that we have summarized above.

Having made these findings the District Court nevertheless held that the railroad services rendered on tracks B and C constituted "essentially local activities" and were therefore outside the jurisdiction of the Interstate Commerce Commission under Section 1(18) of the Act. (Pet. pp. A-33-A-35). It denominated tracks B and C "switching" or "side" tracks within the meaning of Section 1(22), which exempts "spur, industrial, team, switching, or side tracks, located . . . wholly within one State," from the requirements of Section 1(18), in large part because the inter-

change function performed on these tracks involves "switching" and "siding" movements as those terms are defined in a dictionary. (Pet. pp. A-31-A-32). The court also engaged in a lengthy analysis of whether, without tracks B and C, respondent could perform its vital transportation services adequately and concluded that it could. (Pet. pp. A-36-A-40).

The Court of Appeals reversed the judgment of the District Court. It held that Section 1(18) of the Act forbids the abandonment of tracks B and C without a certificate from the Commission and that Section 1(22) does not operate to withdraw tracks B and C from the Commission's jurisdiction merely because train movements performed on these tracks involve "the use of the tracks as passing tracks, for the temporary storage of cars and for occasional switching operations . . .." (Pet. p. B-12). Because train movements of that sort are essential to the interchange function that respondent's system provides for "the through movement of freight" and "are part of the actual transportation haul," the court held that tracks B and C must be regarded as "a part of the line of railroad of the New Orleans Terminal Company" which cannot be abandoned without the approval of the Commission under Section 1(18). (Pet. pp. B-10, B-12). The Court of Appeals pointed out that "the matters upon which the district court relied," matters affecting the continuing adequacy of the respondent's transportation services without tracks B and C, were matters that would appropriately enter into a decision of the Interstate Commerce Commission as to whether the public convenience and necessity permitted abandonment of those tracks. It remanded with a direction that petitioners be temporarily enjoined from compelling respondent to abandon tracks B and C pending an application by

petitioners to the Commission for an order authorizing abandonment of the tracks. (Pet. pp. B-12-B-13).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is on issues that petitioners themselves describe as revolving "around one narrow point." (Pet. p. 2). The point, which has to do with the nature of two of respondent's railroad tracks and their proper classification under the Interstate Commerce Act, relates only to the particular facts of this case and is therefore of no general legal importance. Moreover, the Court of Appeals' decision is plainly correct and conforms with decisions of this Court and other courts of appeals. No conflict among the circuits is alleged. The decision below is closely paralleled by decisions of the Courts of Appeals for the Sixth Circuit and the Eighth Circuit. *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir.), *cert. denied sub nom. Louisville & N. R.R.* v. *ICC*, 385 U.S. 830 (1966); *City of Des Moines* v. *Chicago & N.W. Ry.*, 264 F.2d 454 (8th Cir. 1959). More than that, the factual and legal analysis in the opinion of the court below accords with the construction of the provisions of the Interstate Commerce Act at issue here, Sections 1(18) and 1(22), that this Court adopted soon after their enactment and has since consistently followed. See *Texas & Pac. Ry.* v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266 (1926); *Alabama & V. Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244 (1926); *Chicago & N.W. Ry.* v. *Chicago, M., St. P. & P.R.R.*, 380 U.S. 448 (1965).

Petitioners assert that the decision below is inconsistent with the proposition that Section 1(22) of the Act is intended to reserve "exclusively to the states control over . . . essentially local activities," a prop-

osition derived from this Court's opinions in *City of Yonkers* v. *United States,* 320 U.S. 685 (1944); *United States* v. *Idaho,* 298 U.S. 105 (1936), and *Western & A.R.R.* v. *Georgia Pub. Serv. Comm'n,* 267 U.S. 493 (1925). (Pet. pp. 8-9). The hyperbolic assertion is even made that the court below "has literally written Section 1(22) out of the Transportation Act of 1920." (Pet. p. 9).

There is no substance to any of this. The manner in which Sections 1(18) and 1(22) are to be accommodated was decided long ago by this Court in *Texas & Pac. Ry.* v. *Gulf, C. & S.F. Ry.,* 270 U.S. 266 (1926). What is a "spur, industrial, team, switching or side" track within the meaning of Section 1(22) and what, on the other hand, is a line of railroad or extension thereof within the meaning of Section 1(18) is to be determined not according to technical usage but in light of the context of those sections in the Transportation Act of 1920 and the policy of that Act, by which "Congress undertook to develop and maintain . . . an adequate railway system," using as its instrument the Interstate Commerce Commission. Thus, by Section 1(18) the Commission was given authority to pass upon railroad extensions and abandonments "of national concern" while to the states was left control of the construction or abandonment of tracks described in Section 1(22), tracks wholly within the borders of a single state, built to serve individual shippers. 270 U.S. at 277-78.

The operations of respondent, in which tracks B and C play a vital part, are plainly "of national concern." All three of respondent's tracks in Jefferson Parish, as the District Court itself recognized, provide rail service that is directly and importantly related to the movement of freight through the New Orleans terminal

area, and an overwhelming proportion of the traffic moving on those tracks is interstate traffic. None of the tracks is in any sense related to purely local service or to essentially local activities. The Court of Appeals was correct in recognizing that, although tracks B and C permit respondent to perform "switching" and "passing" movements associated with the interchange function, these movements are essential to the passage of freight through the New Orleans terminal area and are therefore themselves an integral part of the transportation haul. The services performed on Tracks B and C are no more "local" or "intrastate" in their nature or purpose than are the rail services performed by respondent on its "mainline" track A or on its system generally.

The principle of the *Texas & Pacific* case was applied very recently by this Court to interchange tracks comparable to the tracks involved here in *Chicago & N.W. Ry.* v. *Chicago, M., St. P. & P.R.R.*, 380 U.S. 448 (1965), *reversing* 214 F. Supp. 244 (E.D. Wis. 1964). That case involved the question whether construction of a 262-foot long interchange track, and "two parallel interchange sidings," permitting the delivery and transfers of trains between two independent carriers and other train "movements required to interchange cars on the connection," was an "extension" of the carrier's "line of railroad" under Section 1(18) or was excluded from Commission jurisdiction by virtue of Section 1(22). 214 F. Supp. at 246. The Commission's order ruling that the tracks were not exempt, that the extension making the connection could not be built without its certificate, was vacated by a three-judge court. On direct appeal this Court found it necessary merely to issue a two-sentence order reversing the three-judge court, citing the *Texas & Pacific* case.

The *Chicago, Milwaukee* decision was foreshadowed by *Alabama & V. Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244, 249 (1926), decided at the same time as *Texas & Pacific*. In *Alabama & Vicksburg* the Court said that it was clear that a connection effecting a junction "between the main lines of two railroads" was not a track of the kind described in Section 1(22).[3]

Petitioners profess to find this Court's per curiam order in *Chicago, Milwaukee* cryptic and the law thus in need of clarification. The court below, which relied upon the *Chicago, Milwaukee* decision (Pet. pp. B-7-B-11), had no such problem. Following its discussion of the case, the court phrased the distinction between tracks subject to Section 1(18) and those excluded from its coverage by Section 1(22) in this way:

> "If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof,' and there can be no abandonment of such trackage without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission. If, however, the trackage

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[3] The Court also referred to the fact that "the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services," over which matters the Interstate Commerce Commission "has exclusive jurisdiction." The court below found it unnecessary to rely upon provisions of the Interstate Commerce Act dealing specifically with the duty of carriers to maintain adequate interchange facilities and the power of the Commission to enforce the duty, see §§ 1(4), 3(4), 12, 49 U.S.C. §§ 1(4) 3(4) 12 (1964), but, as the *Alabama & Vicksburg* case suggests, those provisions erase any doubt there might otherwise be concerning the Commission's jurisdiction and the lack of local power to interfere with interchange facilities used in interstate commerce. *Cf.* Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

> is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction." (Pet. pp. B-10-B-11).

Three opinions of this Court are cited by petitioners for the unquestioned proposition that Section 1(22) expresses a policy of reserving to the states control over local activities. (Pet. pp. 8-9). In two of these state power was actually sustained, and these cases also illustrate the distinction drawn by the court below. *United States* v. *Idaho,* 298 U.S. 105 (1936), involved a branch line serving a single coal mine, and *Western & A.R.R.* v. *Georgia Pub. Serv. Comm'n,* 267 U.S. 493 (1925), involved a siding on which two shippers were served.[4] Petitioners are wrong in asserting that by the decision below "grave doubt is cast" on these decisions. These cases are fully consistent with the distinction applied by the court below.

Closely analogous to this case are two court of appeals decisions that we have cited above sustaining ICC jurisdiction over short lengths of tracks

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[4] The third case cited by petitioners in this part of their petition, City of Yonkers v. United States, 320 U.S. 685 (1944), is presumably cited for its language. The case involved another aspect of § 1(22), the provision that the Commission's authority under § 1(18) does not extend to "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." This Court returned a case to the Commission with directions to make findings that it had not theretofore made as to whether a suburban or interurban electric railway that it had by certificate permitted to be abandoned was operated as a part of a general steam railroad system.

in cities. In *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir.), *cert. denied sub nom. Louisville & N. R.R.* v. *ICC,* 385 U.S. 830 (1966), the Sixth Circuit enjoined carriers from abandoning without an ICC certificate passenger terminal tracks used in through movements. And in *City of Des Moines* v. *Chicago & N.W. Ry.,* 264 F.2d 454 (8th Cir. 1959), the Eighth Circuit rejected a city's prayer for an order compelling a railroad to remove its tracks from a city street. It did so on the ground that the question whether the tracks could be abandoned was for the ICC. The court stated that the test of whether there was an abandonment within the meaning of Section 1(18) was whether the public convenience and necessity, committed to the Commission for decision, was colorably involved. *Id.* at 458. In this case there is no doubt that questions of the public convenience and necessity are involved. The District Court was able to sustain the Jefferson Parish ordinance only by making its own decision whether the public convenience and necessity permitted removal of respondent's tracks B and C.

The judgment of the court below remits the petitioners to their remedy before the Interstate Commerce Commission, where they may ask for a certificate authorizing abandonment of tracks B and C. See *Thompson* v. *Texas Mexican Ry.,* 328 U.S. 134, 145 (1946). There they will have the opportunity to attempt to persuade the Commission that those tracks are not required by the public convenience in respondent's overall operation. The Court of Appeals was clearly correct in ruling that, under the statute and controlling decisions of this Court construing it, that decision may be made only by the Commission.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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